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AUTHORITIES CITED:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 494.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-CHUMPULLA, *ET AL.*, *Appellants*,

vs.

CHEPARNEY LARNEY, A MINOR, AND BENNIE GREEN, HIS LEGAL GUARDIAN, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLANTS.

Statement of the Case.

The question involved in this case is as to the conclusiveness as to identity of the decision of the Commissioner to the Five Civilized Tribes upon the enrollment of a Creek child under the Act of March 3, 1905 (33 Statutes at Large, 1071).

In the bill filed in the District Court of the United States for the Eastern District of Oklahoma

the plaintiff, claiming to be Cheparney Larney, alleged that he was enrolled as a full blood Indian opposite Creek Tribal Roll No. 1287 New Born Creek Roll; that he received the lands, the title to which is involved in the action, as a distributive share of the lands of the Creek Nation; that he went into possession of the same after allotment thereof and had been in the open, notorious, peaceable possession thereof since receiving patents therefor.

It is alleged that defendant, Big Jack (who died after the decree and whose heirs were substituted in his place—see order reviving cause, Tr., p. 8), who was enrolled as a full-blood Creek, opposite No. 8291, and the defendant, Bettie, enrolled as a full-blood Creek opposite No. 8292, claimed that Cheparney Larney is their son and is dead, and that acting upon such belief they executed a deed to the land described and petitioned the County Court of McIntosh County for an order approving said deed, and by reason thereof an order was obtained approving the same to the defendant, L. B. Norton, who had filled the deed for record in the office of the county clerk of Creek County, Oklahoma. The bill then denies that Big Jack and Bettie were father and mother of the plaintiff, but alleged that his father was Jacob Larney, sometimes known as Jacob Tiger, enrolled as full-blood Creek Indian opposite No. 7968, and that his mother was Bettie Larney, sometimes known as Lucy Green, enrolled as a full-blood Creek Indian opposite No. 8361.

He prays that he be decreed to be the identical person to whom said land was allotted, and that the deed executed by Big Jack and Bettie to L. B. Norton be declared null and void, and cancelled as a cloud upon his title, and that the defendants be enjoined form asserting any title and interest in the land described. (See Tr., pp. 1 to 3.)

The defendants in their amended answer to the bill denied that plaintiff was the person enrolled as Cheparney Larney opposite new born Creek roll No. 1287, and denied that the lands described in the petition were allotted to plaintiff or that he was entitled to the possession of the same, and alleged that he withheld possession of the land wrongfully from them for the reason that the land allotted under said roll number to Cheparney Larney was intended for and made to a deceased son of the defendants Big Jack and Bettie in pursuance of the Act of Congress of March 3, 1905, and various other acts prior thereto. They further stated that said deceased child was born in the year 1904, and died in November, 1906; that during his lifetime proceedings were commenced by the Commission to the Five Civilized Tribes to enroll said child, and much data and information was gathered and presented to the Commission from time to time. That on February 23, 1907, said Commission, after considering all the data and information before collected and presented, rendered a written decision which described Cheparney

Larney as the son of Big Jack and Bettie, who were identified in said decision by their Creek roll numbers as they appear upon the final rolls of said tribe, to-wit, 8291 and 8292, respectively.

Defendants admitted the execution and approval of the deed referred to in the complaint.

They prayed for a decree finding that Cheparney Larney was the son of the defendants, Big Jack and Bettie, and upon his death they inherited the land described in the complaint, and that the conveyance of the same to the defendant Norton vested Norton with title thereto. They further prayed that Norton be decreed to be the owner of the land and entitled to possession thereof, and that his title be forever quieted in him. (See Tr., pp. 4 to 6.)

Upon final hearing the court found in favor of the plaintiff and rendered a decree quieting plaintiff's title against the claims of defendants, cancelling the deed referred to, and enjoining defendants from asserting any claim of any right, title or estate in the premises by virtue of said deed, hostitle or adverse to the title of the plaintiff (Tr., pp. 6 and 7).

Evidence.

The evidence introduced in this cause shows that the preceedings for the enrollment of Cheparney Larney were commenced apparently by taking the testimony of one Alex Posey, a copy of which was offered as plaintiff's exibit No. 1 (Tr., p. 21). He, on April 24, 1905, testified before the Commission that he had been engaged recently in the field for the Dawes Commission securing evidence about Creek citizens or new borns, and had a list of children for whom application could not be made and about whom he had succeeded in obtaining some information. Among others in this list appears the following: "Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town, have a child. Post office, Hanna, Indian Territory" (Tr., p. 22). On February 16, 1907, Alex Posey was again sworn and examined and stated that on July 19, 1905, he went to the home of Jacob and Bettie Larney for the purpose of obtaining information with regard to a child of theirs. He was under the impression that the child was a boy, and it appeared at that time to be about a year old. The parents refused to give any information concerning the child. The father of the child's mother was very much opposed to the work of the Commission. He had made inquiries a short time before and was informed that the the child was still living (Tr., p. 24).

The Commissioner to the Five Civilized Tribes, on February 23, 1907, handed down his decision in

the matter of the application for the enrollment of Cheparney Larney, which appears in full at page 25 of the transcript. The Commissioner found as follows:

> "It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said child, and that the parents refused to give such information because of the influence over them of the Snake or disaffected faction of the Creeks; that the clerk in charge is under the impression that said child is a male but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word 'Cheparney' signifying 'little boy'.
>
> "The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively.
>
> "'The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.
>
> "Although the evidence herein is not as full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view

of the provisions of the Act of Congress approved April 26, 1906 (34 Stat. L. 137), nxing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence should be considerd sufficient to establish the facts necessary to enrollment.

"It is, therefore, ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905 (33 Stat. L. 1048), and the application for his enrollment as such is accordingly granted.

Tams Bixby, *Commissioner.*

Muskogee, Indian Territory, Feb. 23, 1907."

Pursuant thereto Cheparney Larney was placed upon the rolls of new born citizens by blood opposite No. 1287, his age was given as 1; sex, male; blood, full, and patents were subsequently issued covering the land involved in this suit.

The question at issue in this case is whether plaintiff is the person enrolled as Cheparney Larney, or whether the allottee was the deceased child of defendants, Big Jack and Bettie.

The testimony offered on behalf of the plaintiff, briefly, is to the effect that the plaintiff is the child of Jacob Larney, also known as Jacob Tiger, and Petey Larney, also known as Lucy Green or Lucy Tiger, enrolled however as Lucy Green, Jacob Larney being

enrolled as Jacob Tiger. That plaintiff while attending school and college was known as Artis or Articee Tiger, and in January, 1922, at the time of the trial was about 19 years old (see testimony of plaintiff, Tr., pp. 9, 10). That plaintiff's mother was the daughter of Ben Green, plaintiff's present guardian, and she and Jacob Tiger, her husband (or Jacob Larney) lived near Hanna, Oklahoma, and about a mile apart from Big Jack and his wife, Bettie. Big Jack was known as Jackie or Jakey Thlocco, and his wife Bettie had three sons known as Okchumpulla, Tecumseh and Okseetka. This Indian, Jackie Thlocco, is enrolled as Big Jack opposite No. 8291, and his wife Bettie is enrolled as Bettie opposite No. 8292. Jacob Larney died about 1916 (see testimony of Ben Green, Tr., pp. 10-12; J. H. Hill, pp. 12-13). Tecumseh and Okseetka are dead. Tecumseh lived to be a man and had children. Okseetka died when an infant (Tr., pp. 12-13; see testimony, too, of Joseph Pigeon, pages 13 and 14, and Lucy Green, p. 14).

On behalf of the defendants the evidence showed that Big Jack and Bettie had three boys, the oldest one named Tecumseh, the next one Okchumpulla, and the youngest one Cheparney. Cheparney was living at the time that Alex Posey was in that neighborhood. He died about 1906 (see testimony, Thomas Red, Tr., p. 16; George Simmons, p. 17; Cutsee Harjo, p. 17). Big Jack's wife, Bettie, was known also as Bettie Larney. Big Jack did not attempt to have

his children enrolled, but when Alex Posey was in the country trying to find the new born Creeks he had three boys, Tecumseh, Okchumpulla and a little boy they called Cheparney. This little boy was never called Okseetka. (See testimony of Big Jack and Bettie, Tr., pp. 18 and 19.)

The roll card for Cheparney Larney (see exhibit 1, Tr., opposite p. 20) shows Cheparney Larney: Age, March 4, 1905, one; sex, male; blood, full; name of father, Jacob Larney; father's roll No. 8291; name of mother, Bettie Larney; mother's roll No. 8292; born in 1904; remarks: "Application for enrollment of No. 1 received April 24, 1905; name of father appears on final roll No. 8291 as Big Jack. Name of mother appears on final roll No. 8292 as Bettie," and other remarks not relevant.

The plaintiff introduced the enrollment record for Okchumpulla and the decision by the Commissioner rendered therein February 19, 1907 (note that this was three days after Alex Posey testified regarding the child of Jacob and Bettie Larney, enrolled as Cheparney Larney, and four days before the decision of the Commissioner enrolling Cheparney). In this decision (Tr., pp. 31 and 32) the Commissioner says:

> "The evidence shows that at the time of the original and only proceeding had herein the said Jackey Thlocco and Bettie Jack or Thlocco had two male children living named Okchumpulla and Okseetka, of which Okchumpulla was the

> oldest. Such being the case, Okchumpulla must have been born prior to March 4, 1906."

And Jackie Thlocco and Bettie Jack or Thlocco are identified as those enrolled opposite 8291 and 8292, respectively. This decision was based upon the testimony of one William Barnett, given on July 9, 1906, which was as follows (Plaintiff's Ex. 4, Tr., p. 30):

> He belonged to Hillabee Town and knew the following minor children for whose enrollment application had not been made: "Bettie Jack or Thlocco and Jackey Thlocco, both of Hillabee Town, have two children. The oldest is named Okchumpulla and the other Okseetka. Both children are boys and are living." And the postoffice address of the parents is given as Hanna. This testimony was given on July 9, 1906. That was all there was in Barnett's testimony. A decision of the Commissioner upon this in regard to the enrollment of Okseetka was also offered (see Tr., p. 33), in which the Commissioner found:
>
> > "The evidence shows that at the time of the original and only proceeding had herein the said Jackey Thlocco and Bettie Jack or Thlocco had a male child named Okseetka, but there is nothing whatever to show when said child was born, whether prior to or subsequent to the 4th day of March, 1906, although diligent efforts have been made by this office through field parties to obtain such information.
> >
> > "In view of the foregoing I am of the opinion that there is no authority of law for the enrollment of said Okseetka as a citizen by blood

of the Creek Nation, and the application for his enrollment as such is accordingly dismissed."

This decision was also rendered on February 19th, 1907.

The census card of Big Jack was introduced (see opposite page 38) showing him to be enrolled opposite No. 8291 as Big Jack, age 50, sex male, full-blood, tribal enrollment as Hillabee Canadian; and his wife Bettie enrolled opposite 8292, age 40, full-blood, tribal enrollment Hillabee Canadian; their enrollment being approved on March 28, 1902, the card being dated May 23, 1901.

Lucy Green's card (plaintiff's Exhibit No. 14) shows she was enrolled as a full-blood opposite No. 8361 on May 23, 1901, as 18 years of age, tribal enrollment being Hillabee Canadian, and Jacob Tiger was enrolled opposite No. 7968 under the name of Jacob Tiger, as 45 years of age, a full-blood, tribal enrollment Tulladegee, on May 23, 1901 (see plaintiff's Exhibit No. 15).

The United States Circuit Court of Appeals for the Eighth Circuit affirmed the decree below, holding in effect that the decision of the Commissioner to the Five Civilized Tribes upon the application for the enrollment of Cheparney Larney did not conclusively determine that he was the child of Big Jack and Bettie, the original defendants in this cause (Tr., pp. 50, 55). Although it was alleged in the bill that there was no diversity of citizenship between the parties,

and although the bill did not set forth or allege that the action was one arising under a law of the United States, the Circuit Court of Appeals nevertheless held that jurisdiction in the court below was rested upon the fact that a construction of the Act of March 3, 1905, was necessarily involved and that this made a federal question which gave the court below jurisdiction of the cause. Upon the claim made by the plaintiff and sustained by the Circuit Court of Appeals that jurisdiction was invoked because the case involved a federal question, there being no diversity of citizenship, the decision of the Circuit Court of Appeals is not final and would be reviewable in this court under section 241, Judicial Code.

—*Spiller* v. *A. T. & S. F. R. R. Co.*, 253 U. S. 117, 64 Law. ed. 810.

SPECIFICATIONS *of* ERROR.

The specifications of error upon which the appellants rely are as follows:

1. The said court erred in affirming the decree of the United States District Court for the Eastern District of Oklahoma rendered in this cause, and in holding that the said United States District Court for the Eastern District of Oklahoma had jurisdiction to render its judgment in this cause, for the reason that the bill filed in this cause failed to contain any allegations sufficient to vest said District Court of the United States for the Eastern District of Oklahoma with jurisdiction to render a final decree herein, and for the reason that the record in this cause does not show that said District Court had jurisdiction thereof.

2. The said United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to hold that the enrollment record of the person enrolled on the New Born Creek Indian roll opposite roll number 1287 as Cheparney Larney was conclusive of the fact that such person was the child of Big Jack, enrolled on the Creek Indian roll opposite roll number 8291, and Bettie, enrolled on the Creek Indian roll opposite roll number 8292.

3. The said United States Circuit Court of Appeals for the Eighth Circuit erred in holding that

the decision of the Commissioner to the Five Civilized Tribes in the matter of the enrollment of Cheparney Larney did not conclusively identify the person enrolled as Cheparney Larney upon the New Born Creek Indian roll opposite number 1287 as the child of Big Jack, enrolled on the Creek Indian roll opposite number 8291, and Bettie, enrolled on the Creek Indian roll opposite number 8292.

4. The said United States Circuit Court of Appeals for the Eighth Circuit erred in finding and holding that the appellee, Cheparney Larney, was the person enrolled by the Commissioner to the Five Civilized Tribes upon the New Born Creek Indian roll opposite roll number 1287.

ARGUMENT.

1. **The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek roll, conclusively identifies the allottee as the child of these persons.**

This court has so frequently had occasion to pass upon questions involving the treaties made by the Creek tribe of Indians with the United States that the history of the enrollment of these Indians by the Dawes Commission is doubtless well known. Under the Original Creek Agreement of March 1, 1901 (31 Statutes at Large 861, chapter 676, section 28), it was provided:

> "All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the Act of Congress approved June 28, 1908, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress. * * *
>
> "All children, born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living, shall be placed on the rolls made by said Commission. * * *
>
> "The rolls so made by said Commission when approved by the Secretary of the Interior shall be the final rolls of citizenship of said

tribe upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

By the Supplemental Agreement with the Creek Indians (Act of June 30, 1902, 32 Statutes at Large, chapter 1323, sections 7 and 8), the class of children entitled to enrollment was enlarged to embrace those born to citizens entitled to enrollment under the Original Agreement subsequent to July 1, 1900, and up to and including May 25, 1901, if living upon the latter day, and also all those living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or 1895 and entitled to enrollment as provided by the Original Agreement. In short, the Supplemental Agreement provided for the enrollment of all children living May 25, 1901, regardless of the time of birth, provided they were born to citizens entitled to enrollment under the Original Agreement.

The Act of March 3, 1905 (33 Stat. at L. 1071), again enlarged the class of children entitled to enrollment, but in this act a more limited method of classifying those entitled to enrollment was followed than previously, for it did not include children born to citizens *entitled* to enrollment but only children born to citizens *whose enrollment had been approved* by the Secretary of the Interior prior to the approval of the act. It provided as follows:

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the approval of this act to receive and consider applications for enrollments of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on said latter date, to citizens of the Creek tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

Allotments of land were to be made to these new born children the same as to other citizens of the tribe. See:

Harris v. *Bell*, 254 U. S. 103, 65 L. ed. 159.

Cheparney Larney, the person enrolled and to whom the allotment of land was made which is involved in this case, was a child belonging to the class provided for by the Act of March 3, 1905, and was enrolled by the Commissioner pursuant to the power granted under that act. In the decision of the Commissioner (who, acting for the Secretary of the Interior, was the successor of the Dawes Commission; see *United States, ex rel. Lowe*, v. *Fisher*, 223 U. S. 95; *Martin* v. *United States*, 93 C. C. A. 484, 168 Fed. 198), enrolling Cheparney Larney, he found as follows:

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as Big Jack and Bettie on a

schedule of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite numbers 8291 and 8292, respectively." (Tr., p. 25.)

It is our contention that this finding of the Commissioner identifying the parents of Cheparney Larney as Big Jack, opposite roll number 8291, and Bettie, opposite roll number 8292, conclusively identifies the allottee, Cheparney Larney, as the child of the original defendants in this case, under whom appellants claim. This principle, it seems to us, must necessarily follow from a proper construction of the Act of March 3, 1905. It is clear that under that act the Commission was required to find four matters favorable to an applicant before it had authority to enroll: *First*, that the child was born subsequent to May 25, 1901; *second*, that the child was born prior to March 4, 1905; *third*, that the child was living on March 4, 1905; and *fourth, that the child was born to citizens of the Creek tribe of Indians whose enrollment had been approved by the Secretary of the Interior prior to March 3, 1905.* To this extent the Circuit Court of Appeals in its decision of this case agreed with us, for it held:

> "It is apparent from the wording of the statute that the applicant, to be entitled to enrollment, must have been *(1)* born subsequent to May 25, 1901; *(2)* born prior to March 4, 1905; *(3)* living on March 4, 1905; *(4)* born to citizens of the Creek tribe whose enrollment had been approved by the Secretary of the In-

> terior prior to March 3, 1905. The enrollment of the applicant, and especially when followed, as in the case at bar, by a certificate as to allotment and by allotment deeds or patents, would be conclusive that these four matters had been decided favorably to the applicant." (Tr., p. 53.)

But we further contend that the requirement which we have recited as the fourth requirement, *viz.*, that the applicant was born to citizens of the tribe whose enrollment had been approved by the Secretary of the Interior, necessarily required an identification of the parents of the child upon the approved tribal roll, and that a finding by the Commissioner identifying the parents upon the approved tribal roll was just as essential to the exercise of its jurisdiction in the matter as a finding that the child was born subsequent to May 25, 1901. To this extent the Circuit Court of Appeals differed with us, that court holding that the identification of the parents by the Commissioner upon the tribal rolls was not a material finding necessary to the exercise of the Commissioner's jurisdiction.

It is settled beyond controversy now that the Commission to the Five Civilized Tribes (and its successor, the Commissioner) was a quasi-judicial tribunal, empowered to determine who should be enrolled as citizens of those tribes, what land should be allotted to each, and in what way, and that its adjudication of those questions and of every issue

of law and fact which it was necessary for it to determine in order to decide them is conclusive and impervious to collateral attack.

—*United States* v. *Wildcat*, 244 U. S. 111, 61 Law. ed. 1024;

United States v. *Atkins*, 260 U. S. 220, 67 Law. ed. 95;

Malone v. *Alderdice*, 129 C. C. A. 204, 212 Fed. 668;

Nunn v. *Hazelrigg*, 132 C. C. A. 474, 216 Fed. 330;

Folk v. *United States*, 147 C. C. A. 183, 233 Fed. 177;

Kimberlin v. *Commission to the Five Civilized Tribes*, 44 C. C. A. 109, 104 Fed. 653.

In *United States* v. *Atkins, supra*, this court, quoting with approval from *United States* v. *Wildcat, supra*, said:

> "There was thus constituted a quasi-judicial tribunal whose judgments, within the limits of its jurisdiction, were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal land. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was es-

tablished and endowed with authority to hear and determine the matter.

"When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter upon the approval of the Secretary should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake."

In the case of *Nunn* v. *Hazelrigg, supra,* the Circuit Court of Appeals for the Eighth Circuit correctly, we think, laid down the rule as to what matters should be deemed conclusively settled by the adjudication of the Dawes Commission enrolling a citizen. It had before it in that case the question as to whether or not the enrollment of an Indian as an Indian by blood upon the Creek rolls was conclusive of the fact that such allottee was a mixed-blood Indian and not a freedman citizen, who, under the Act of April 21, 1904, were freed from restrictions against alienation. In discussing the question Judge Sanborn said:

"It (the Dawes Commission) was expressly required to make separate rolls of the Indians and freedmen. To be enrolled as a Creek Indian it was not sufficient for an applicant to show that he was an Indian, but himself show, and the Commission must find, that he was an Indian of the Creek tribe; and to be enrolled

> as a freedman it was not sufficient to show that he was an African, but himself show, and the Commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek tribe, or at least a slave of some other person adopted by the Creek Nation. It was, therefore, necessary for an applicant for enrollment to show upon what grounds he was entitled to such enrollment; that he was of Creek blood; that he was a Creek freedman, became a citizen of the tribe by the treaty of June 14, 1866; or that he had, without any such rights, become a member of the tribe by adoption. And when the Commission found by any one of these methods a person was entitled to enrollment, *the manner in which he was found to be entitled to such enrollment was adjudicated as much as the mere fact of the right of enrollment.*" (Italics ours.)

In *Malone* v. *Alderdice, supra,* the same court considered a contention that the recital of the age of a Creek allottee, prior to the Act of May 27, 1908, making such finding conclusive, was a conclusive adjudication by the Commission of that fact, and in discussing it, said:

> "Upon these provisions of the Act of Congress counsel base the proposition that the adjudication of the age of each citizen, and especially of each minor, was indispensable to the decision of his claim to enrollment. The position is not without persuasive power when a general view of this legislation is taken, but when these statutes are anaylzed and the real issue, the question whether or not it was essential to the

determination of the issue who should be enrolled that the Commission should adjudge when the minority of each minor would cease, is kept constantly in mind, the force of the argument disappears. The provision of the Act of June 28, 1898, that the Commission should make the rolls descriptive of the persons thereon so that they might be identified falls far short of granting jurisdiction to that Commission to adjudge conclusively on what day each minor on those rolls would attain his majority and thus to determine when he could buy, sell and convey property free from the disqualifications of his minority. * * * This was not the purpose or the effect of this provision of the Act of 1905. It was limited in object and in result to the making of a description of the persons enrolled for the purpose of their identification and not for the purpose of the final adjudication of the extent and limits of their disqualifications by reason of their respective ages or otherwise.

"It is true that it was necessary for the Commission to determine in making its rolls whether or not certain applicants were born before July 1, 1900, but that fact clearly gave it neither excuse nor power to adjudge the limits of the respective minorities of enrolled minors.

"It is also true that in making the allotments it was essential to the discharge of its duty that the Commission should decide at the time each citizen or freedman made his selection of his allotment, and also at the time he made his selection of his homestead, whether or not he was a minor in order to determine whether his selection must be made by himself or by

another. But it was also indispensable for it to determine at such times in each case and for the same reason whether or not the applicant was a prisoner, a convict, an incompetent, or an aged and infirm person. It was not, however, indispensable to the complete exercise by the Commission of its jurisdiction here, nor had it the power to determine how long after the selection of any minor, prisoner, convict, incompetent, or aged and infirm person his disability would continue, and there are two unanswerable reasons why the provisions of the Acts of Congress with reference to the allotments failed to give jurisdiction to the Commission conclusively to adjudicate by its enrollment of the citizens and freedmen of these tribes their respective ages and the time limits of the respective minorities of the minors. *First*, none of those provisions granted jurisdiction to the Commission in making the enrollment to adjudge the ages of the minors, nor was it necessary for that Commission in deciding who were citizens and freedmen to determine anything concerning their ages except that they were born before July 1, 1900; *second*, none of the provisions regarding the allotments required the Commission to do, or granted it the power to do, more regarding the ages of those enrolled than to determine at the times of his selections whether each allottee was then a minor or otherwise disqualified, and his requisition and power gave it no jurisdiction or authority to adjudge conclusively the extent or limits of their disqualification. And our conclusion is that the Commission to the Five Civilized Tribes had no jurisdiction in making its enrollment of their cit-

izens and freedmen to determine and conclusively adjudge their respective ages."

—*Malone, et al.*, v. *Alderdice, et al., supra.*

Obviously, however, the reasons why the recital of age was not there regarded as a conclusive finding, is equally applicable here to show that the recital as to the parents of the person enrolled and their roll numbers is a conclusive finding. It was held in that case that the age of the person enrolled was not conclusive, because the Commission was not required to find that in the exercise of its jurisdiction. But here the Commission was required to find that the applicant's parents had been enrolled and their enrollment approved by the Secretary of the Interior in order to justify it in exercising its jurisdiction. And under the principles laid down in that case, if the finding was essential to the exercise of jurisdiction, it became an established fact which could not be collaterally attacked.

For instance, the adjudication that a citizen (other than new borns) was entitled to enrollment is conclusive of the fact that such citizen was living on April 1st, 1899.

— *United States* v. *Wildcat, supra;*
United States v. *Atkins,* (C. C. A.) 268 Fed. 823.

It is demonstrated by these decisions that the rule in determining whether or not the finding of the Commissioner was conclusive, is: Was such find-

ing essential or material to the exercise of its jurisdiction? If it were, the determination of the Commissioner is a conclusive judgment; if it were not, it has no force or effect.

In *Hegler* v. *Faulkner*, 153 U. S. 109, 38 Law. ed. 653, it was contended that a census prepared by an Indian Agent in ascertaining the number and names of the half-breeds entitled to participate in allotments to the Indians of the Iowa Tribe, was admissible for the purpose of showing the age of an Indian named George Washington, listed thereon, and this court in considering the matter said:

> "Conclusiveness is a characteristic of the judgment of every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created. But such conclusiveness is restricted to those questions which are directly submitted for decision. In the case in hand, doubtless the identity of the half-breed, George Washington, and his right to receive the land in question as his share of the lands appropriated by the treaty, were finally found."

Applying this rule to the present controversy the question resolves itself into this: Was the identification of the parents upon the rolls of the tribe essential to the exercise of the Commissioner's jurisdiction in enrolling Cheparney Larney?

As we have shown, the Act of March 3, 1905, limited the Commissioner in enrolling new born chil-

dren to such only as were children of parents whose enrollment had theretofore been approved by the Secretary of the Interior. Obviously, in order to determine whether or not Cheparney Larney was the child of persons whose enrollment had been approved, the Commissioner necessarily was obliged to identify upon the approved rolls of the Tribe the parents of Cheparney Larney before he could exercise this jurisdiction. For it is clear that he could not determine whether or not Cheparney Larney's parents had been enrolled unless he first determined not only who Cheparney Larney's parents were but under what names and opposite what numbers upon the Tribal roll they appeared. We do not believe the illustration used by the honorable judge who wrote the opinion in the case in the Circuit Court of Appeals to refute this is based upon a correct reason. He illustrates his position by assuming there had been an actual pending controversy as to whether the child was the child of Jacob Larney and wife or of Big Jack and wife, and says that since the enrollment of all these four people had been approved by the Secretary of the Interior the Commissioner would not have been called upon to decide the dispute as to parentage. It seems to us, however, that under such circumstance the Commissioner before he could lawfully exercise his authority to enroll the child would have been required to decide who its parents were. For if there were a dispute as to parentage, the Commissioner could not

determine that the child's parents had been enrolled until he first decided the dispute. It seems to us it would not have been sufficient for him to have decided that the parents might have been Jacob Larney and wife or Big Jack and wife, for that would have been equivalent to a decision that the Commissioner did not know who the parents of the child were. If the Commissioner did not know which of two couples were the parents of the child, it must logically follow that the Commissioner did not know the parents of the child. For if he were not clear that the child was the offspring of the one or the other couple, he could not possibly have known that it was the child of one or the other. The Act required the Commissioner, before enrolling the child, to ascertain the fact that its parents' enrollment had been approved by the Secretary of the Interior prior to March 3, 1905. If the Commissioner had merely ascertained that the child was probably the offspring of one or two couples without ascertaining which couple were the parents, it seems to us that the Commissioner would have failed to perform the duties required of him by the Act. Such a lattitude of power was not permitted him under the Act. It might as well be said that the Commissioner could exercise his jurisdiction by merely determining that an applicant for enrollment was the child of someone, without ascertaining which one, however, enrolled upon the approved tribal rolls.

It is evident from a consideration of the various enrollment Acts that the class of new born children permitted by the Acts to be enrolled was narrowed down and restricted by this Act of 1905 to a very limited class, and that the power given to the Commissioner by this Act to add additional persons to the tribal rolls with a view to participation in the division of the lands of the nation was of a very limited character. It being a limited jurisdiction, it must follow that it was necessary for him to strictly comply with the terms upon which it could be exercised. It seems to us that it was never contemplated that he might determine that an applicant's parents were enrolled without first definitely ascertaining and determining who the applicant's parents were and definitely and clearly identifying those parents upon the approved tribal rolls. In other words, it was requisite that he be able to point out the name and roll number of the parent upon the approved tribal roll in order to exercise this power of adding to the rolls.

This evidently was the construction placed upon the Act by the Commissioner at the time, for he did identify the parents of Cheparney Larney by their names and roll numbers upon the approved rolls of the tribe. He identified them beyond controversy as the defendants below in this case, Big Jack and Bettie, both by name and by giving their roll numbers. It seems to us that if in his decision

there were any conflict between the identification of the parents upon the tribal roll and the identification of the parents under other names by which they might have been known, the finding identifying them upon the tribal roll should be conclusive as to their identification, for that was the material finding essential to the exercise of the jurisdiction conferred, whereas, the finding as to the other names by which the parents might have been known was an immaterial, non-essential finding.

If we are correct in this position, then the decree below should have been reversed, because the Commissioner in his decision in enrolling Cheparney Larney identified the name and roll number of the parents of Cheparney as Big Jack and Bettie, who the record shows were the persons under whom appellants claim,—the appellee conceding that he was not their child.

Both the appellee and the child of Big Jack and Bettie are shown by the evidence in this case to have been entitled to enrollment under the Act of March 3, 1905. One of them was enrolled as Cheparney Larney. One of them, apparently, was not enrolled. If we are correct in the propositions of law which we have heretofore advanced, the court should have determined that the decision of the Commissioner conclusively identified the one enrolled as the child of Big Jack and Bettie. For the parents of the appellee were enrolled under the names of

Jacob Tiger and Lucy Green, opposite roll numbers 7868 and 8361, and could not, therefore, have been the persons whom the Commissioner identified as the parents of Cheparney Larney whom he enrolled.

It is conceded by all the evidence in this case that Big Jack and Bettie did have a child about the age of the child enrolled as Cheparney Larney. It was the plaintiff's claim that this child was named Okseetka, and they showed that a citizen of Hillabee Town named William Barnett gave the Commissioner information to the effect that Big Jack had two boys who had not been enrolled, naming them as Okchumpulla and Okseetka. Okchumpulla was enrolled. (See decision, Tr., p. 31.) Okseetka was denied enrollment for the sole reason that the Commissioner found no evidence to show when he was born, whether prior to or subsequent to March 4, 1906 (See decision, Tr., p. 33). Now the child enrolled as Cheparney Larney was merely referred to by the field clerk who reported the existence of such a child as the child of Jacob Larney and Bettie Larney, whose name could not be ascertained. (Tr., p. 24.) The Commissioner therefore said in his decision:

> "Reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word 'Cheparney' signifying 'little boy'."

The denial of the application of William Barnett to enroll Okseetka was not a finding that such child was not entitled to enrollment, but merely a finding that there was not sufficient evidence before the Commission as to the date of the child's birth to authorize enrollment. It is entirely possible that such child was the child named by the Commissioner as Cheparney Larney and that the Commissioner failed to connect the child named by William Barnett as Okseetka with the child about whom information was given by Alex Posey. It is, however, beyond dispute that Big Jack and Bettie did have a child about the age of the child enrolled as Cheparney Larney and that such child was entitled to enrollment under the Act of March 3, 1905.

The evidence in this record shows that the mother of the plaintiff, or appellee, was enrolled as Lucy Green and known as Petey, whereas, the undisputed evidence showed that Bettie, the wife of Big Jack, was known as Bettie Larney. If it can be supposed that the Commissioner knew that Jacob Larney, of Tullahegee Town, was Jacob Tiger (as contended by appellee), then it must be presumed that the Commissioner must have procured information from some source that Jacob Larney was not the husband of Bettie Larney and that Bettie Larney's husband was Big Jack, and, therefore, must have identified the child as the child of Bettie Larney whose husband was Big Jack and not Jacob Tiger. As stated

by this court in the case of *United States* v. *Wildcat, supra,* it was the practice of the Commission to make inquiries and investigations and to ascertain the facts as to persons enrolled, and that it was the practice to enroll no person without information that was deemed satisfactory at the time. As said by the court in that case:

> "It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrollment as living persons on April 1st, 1899, but it must be remembered that there were many persons whose right to enrollment was being considered and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress."

We respectfully submit that it should have been decreed in this cause that the Commissioner's decision enrolling Cheparney Larney conclusively identified him as the child of Big Jack and Bettie, and that the trial court and the Circuit Court of Appeals erred in decreeing that the appellee was the person enrolled to whom the lands involved were allotted.

2. Did the trial court have jurisdiction of this cause?

In the trial court the question of jurisdiction was not directly raised, but it was assigned as er-

ror in the Circuit Court of Appeals. (See Tr., p. 44.) In the bill filed in this cause it is alleged that the plaintiff was a citizen of the Eastern District of the State of Oklahoma and that the defendants were citizens and residents of the Eastern District of Oklahoma. (Tr., pp. 1 and 2.) Jurisdiction was not invoked, therefore, because of diversity of citizenship.

The only reference in the bill to any Act of Congress or treaty of the United States is a general allegation that plaintiff went into possession of the lands described "by authority of the several treaties between the Creek Nation and the Government of the United States and the laws of Congress that have been enacted dealing with the lands and individuals of the Creek Nation, soon after said allotment was made, and has since been in open, notorious and peaceable possession of the same since the time of receiving his allotment patents from the Creek Nation." (Tr., p. 2.) The controversy, as shown by the allegations of the bill, which caused the litigation was whether or not plaintiff was the person enrolled as Cheparney Larney or whether such person was the deceased child of defendants, Big Jack and Bettie. No allegation is contained in the bill that in enrolling Cheparney Larney the Commissioner to the Five Civilized Tribes identified him as the child of Big Jack and Bettie upon the approved rolls of the Creek Nation. So far as the bill

shows, therefore, the issue was purely an issue of fact as between plaintiff and the defendants and did not show that the meaning or effect of any Act of Congress or treaty of the United States was involved in the determination of the action.

The Circuit Court of Appeals in its decision of this case held that the averments of the complaint were not sufficient to show jurisdiction. In this the court was unquestionably correct, for it is well settled that the federal question must appear, not by mere inference, but by distinct averments, according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show not as a matter of mere inference or argument, but clearly and distinctly that the suit arises under some federal law.

—*Hanford* v. *Davies*, 163 U. S. 273, 41 Law. ed. 157;

Hull v. *Burr*, 234 U. S. 712, 58 Law. ed. 1557.

The mere fact that title was derived from the United States does not give the federal court jurisdiction unless the controversy involves the construction, meaning or effect of the granting Acts.

—*Joy* v. *St. Louis*, 201 U. S. 332, 50 Law. ed. 776.

But the Circuit Court of Appeals held that where the jurisdiction was not challenged by pleading, but the question is raised for the first time in

the appellate court, jurisdiction sufficiently appears if it is shown in any part of the record, including the proofs; and applying this rule to the present case, held that it sufficiently appeared from the pleadings and proofs in this record that the construction of the Act of March 3, 1905, was necessarily involved in the case. This court has announced the rule to be, forbearance of the parties or consent that the case be considered upon its merits does not and should not prevent this court from examining and determining the question whether or not the court whose judgment has been brought here for review had or had not jurisdiction.

—*Metcalf* v. *The City of Watertown*, 128 U. S. 586, 32 Law. ed. 543.

We believe that the Circuit Court of Appeals was wrong in holding that in this character of cases where jurisdiction is attempted to be invoked solely upon the ground that a federal question is involved that the appellate court can look to the entire record to see whether or not the meaning or effect of an Act of Congress was involved in the case. There is a distinction between cases where jurisdiction is based upon diversity of citizenship and those in which jurisdiction is based upon the fact that the cause arises out of a federal law, in this, that in the latter class of cases it must appear at the outset from the declaration or the bill of the

party suing that the suit is one pending upon some question of a federal nature.

—*Metcalf* v. *The City of Watertown, supra,*
Florida etc., R. R. Co. v. *Bell,* 176 U. S. 321, 44 L. ed. 486;
Tennessee v. *Union & P. Bank,* 152 U. S. 454, 38 L. ed. 511;
Shulthis v. *McDougal,* 225 U. S. 561, 56 L. ed. 1205.

The question of jurisdiction in such cases must be determined from the complainant's statement of his own cause of action as set forth in the bill, without regard to any questions that might have been brought into the suit by the answers or in the course of the subsequent proceeding. See authorities above cited, and

Flanders v. *Coleman,* 250 U. S. 223, 63 L. ed. 948.

As said by this court in *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22, 25, 57 L. ed. 716, 717:

> "Of course, the party who brings the suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. * * * Conversely, when the plaintiff bases his cause of action upon an Act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."

If jurisdiction because the suit is based upon a federal statute can only be determined from the allegations of the bill, cannot be conferred by the allegations of the answer, nor even by anticipating the defense in the bill, we do not understand how jurisdiction based upon the construction of a federal Act can be upheld by looking to other parts of the record other than the bill. If we are correct in this, the Circuit Court of Appeals erred in holding that the trial court had jurisdiction of this cause, and if it did not have jurisdiction then the decision below should be reversed and the bill ordered dismissed.

—*Mansfield etc., R. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462, 465.

If the court below had jurisdiction, we believe its decree in favor of appellee should be reversed and a decree rendered in favor of appellants. If it did not have jurisdiction, then the decree should be reversed and the suit ordered dismissed.

Respectfully submitted,

NATHAN A. GIBSON,
JOSEPH L. HULL,
THOMAS L. GIBSON,
GLENN R. HORNER,
Solicitors for Appellants.